Supreme Court, U.S.
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92- 105

No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1992

DALE HOLT,
*Petitioner,*

vs.

PAUL CASPARI and J. P. SMITH,
*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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## QUESTION PRESENTED FOR REVIEW

WERE THE DUE PROCESS RIGHTS OF PETITIONER, A PRISON INMATE, UNDER *WOLFF v. McDONNELL*, 418 U.S. 539 (1974), VIOLATED WHEN AT A PRISON DISCIPLINARY HEARING, AFTER THE INMATE PLED "NO CONTEST" TO A "MINOR INFRACTION" OF PRISON RULES, PRISON OFFICIALS, WITHOUT NOTICE, UPGRADED THE CHARGE TO A "MAJOR VIOLATION" OF PRISON RULES CARRYING WITH IT SERIOUS RESTRICTIONS TO THE PRISONER'S LIBERTY INTERESTS, AND FOUND THE INMATE GUILTY OF THE UPGRADED CHARGE WITHOUT FURTHER PROCEEDING?

## LIST OF PARTIES TO THE PROCEEDINGS

All parties are fully listed in the caption.

Petitioner Dale Holt is currently in the custody of the Missouri Department of Corrections serving a sentence for a felony conviction.

Respondent Paul Caspari, at the time Petitioner filed his Complaint, was Superintendent of the Missouri Eastern Correctional Center in Pacific, Missouri where Petitioner was confined at the time of the events which are the subject of the Complaint.

Respondent J. P. Smith, at the time Petitioner filed his Complaint, was an employee of the Missouri Department of Corrections and presided over the prison disciplinary board involved in the events which are the subject of the Complaint.

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*Respondents.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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## CITATIONS TO OPINIONS BELOW

The original opinion of the three-judge panel of the Eighth Circuit Court of Appeals is printed in Appendix A hereto, *infra,* pages A-1 through A-8. The subsequent opinion upon rehearing of the three-judge panel of the Eighth Circuit Court of Appeals is printed in Appendix B hereto, *infra,* pages A-9 through A-17. The Order of the Court denying Petitioner's Petition for Rehearing or, in the Alternative, Motion for Rehearing by the Court En Banc is printed in Appendix C hereto, *infra,* page A-18.

## JURISDICTIONAL STATEMENT

The opinion of the Court of Appeals for the Eighth Circuit was issued April 17, 1992. A timely Petition for Rehearing or

Rehearing En Banc was denied on June 2, 1992. This Petition is filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

## STATEMENT OF THE CASE

Petitioner is an inmate in the Missouri prison system. On July 24, 1989, Petitioner filed a Complaint in the United States District Court for the Eastern District of Missouri, Eastern Division, for violation of his civil rights under 42 U.S.C. § 1983. In his Complaint, Petitioner alleged, in pertinent part, that on May 9, 1989 he was charged with a violation of prison Rule No. 24, a "minor" infraction involving contraband. Petitioner appeared at a hearing before the Disciplinary Board to defend against the charge. When a certain report relating to the incident was not available to Petitioner, he entered a plea of "no contest." Petitioner then left the hearing room. The Adjustment Board deliberated and reconvened the hearing. The Adjustment Board informed Petitioner that they had found him guilty and, without prior notice, Petitioner was informed that the charge had been changed to an upgraded violation, inmate Rule No. 3 — "Dangerous Contraband," which is considered a "major" violation under prison policy. The Adjustment Board then imposed a sanction of ten days disciplinary segregation and referred Petitioner to the prison's Classification Team, which resulted in Petitioner's prison outdate being revoked, Petitioner being referred for criminal prosecution for possession of the contraband, and Petitioner being transferred to a higher security institution. Petitioner alleged in his Complaint that under written prison policy guidelines, the sanctions imposed by the Classification Team could not have been imposed for violation of Rule No. 24, a "minor" infraction.

The District Court dismissed Petitioner's Complaint *sua sponte* as frivolous before Respondents filed an answer or any other responsive pleadings.

Petitioner then filed an appeal in the United States Court of Appeals for the Eighth Circuit. The Court of Appeals reversed the decision of the District Court, holding, *inter alia*, that "a legal basis exists for Holt's claim that he was denied due process by the rule change." *Holt v. Caspari*, 923 F.2d 103, 105 (8th Cir. 1991).

The Eighth Circuit granted Respondents' motion for rehearing and after hearing argument, affirmed the District Court's dismissal of Petitioner's Complaint. *Holt v. Caspari*, 961 F.2d 1370 (8th Cir. 1992).

On April 23, 1992, Petitioner timely filed his Petition for Rehearing or, in the Alternative, for Rehearing En Banc, which was denied by the Eighth Circuit Court of Appeals on June 2, 1992, with Judge Theodore McMillian noting that he would grant the suggestion for rehearing en banc.

## JURISDICTION OF FEDERAL COURT

The jurisdiction of the District Court was invoked pursuant to 28 U.S.C. §§ 1331, 1343, 2201 and 2202.

## CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment: "No person shall . . . be deprived of life, liberty or property, without due process of law."

Fourteenth Amendment: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

## REASONS FOR ALLOWANCE OF THE WRIT

### AN INMATE'S RIGHT TO DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS ARE VIOLATED WHEN STATE PRISON OFFICIALS CHANGE A DISCIPLINARY CHARGE AGAINST THE INMATE TO A MORE SERIOUS CHARGE, AND FIND HIM GUILTY THEREOF, WITHOUT NOTICE, AFTER THE INMATE ALREADY HAS ENTERED HIS PLEA OF "NO CONTEST" TO THE LESSER CHARGE

The Eighth Circuit Court of Appeals erred in affirming the District Court's *sua sponte* dismissal of Petitioner's Complaint as frivolous. As set forth below, the Complaint stated a serious violation of Petitioner's due process rights.

Respondents' conduct of Petitioner's disciplinary proceedings directly contradicted the due process requirements established by this Court in *Wolff v. McDonnell*, 418 U.S. 539 (1974). In *Wolff*, this Court held that "prisoners may also claim the protections of the Due Process Clause. They may not be deprived of life, liberty, or property without due process of law." *Id.* at 556. The nature of the prison system restricts these rights (*Id.*), but prisoners are not stripped of due process protection. In *Wolff*, under prison procedure an inmate who was the subject of disciplinary charges was given oral notice of such charges. *Id.* at 564. Sometimes the inmate would be brought before the disciplinary hearing committee shortly after oral notification of charges, and at other times a further investigation would occur leading to new charges, of which the inmate would be informed only at the hearing itself. *Id.* This Court held that such procedures violated the inmate's due process rights. This Court held that an inmate must be given written *notice* of disciplinary charges against the inmate at least twenty-four hours prior to the hearing on such charges. *Id.*

Herein, the Disciplinary Board did not give Petitioner twenty-four hours written notice of the charge against him. In fact, Petitioner received no notice of the charge of which he was found guilty. He was found guilty of such charge after he had entered a plea of "no contest" to a less serious charge. Petitioner entered his plea of "no contest" in the belief that he was being charged with a violation of Rule No. 24 — Contraband (a "minor" infraction), but was actually found guilty of violation of Rule No. 3 — Dangerous Contraband (a "major" violation).

Petitioner alleges in his Complaint that, as a result of the conviction of said more serious charge, he was deprived of liberty. Pursuant to the policy of the Missouri Department of Corrections, Petitioner was referred to the Classification Team as a result of the "major" disciplinary violation. The Classification Team recommended that Petitioner's outdate be revoked, that he be referred for criminal prosecution, and that he be transferred to a higher security institution. Petitioner pled in his Complaint that the sanctions imposed by the Classification Team could not have been imposed if the "minor" charge against him had not been raised to a "major" charge.

The ramifications of the Eighth Circuit's ruling in the present case are clear: in direct violation of *Wolff*, state prison officials, with impunity, have changed the seriousness of a disciplinary charge against an inmate, without notice, after the inmate already entered a plea to a less serious charge. As stated by this Court in *Wolff*, "The touchstone of due process is protection of the individual against arbitrary action of government." *Wolff*, 418 U.S. at 114. The actions of Respondents against Petitioner were undeniably arbitrary. It would be as if a judge in a criminal case changed a criminal charge of manslaughter to a charge of first degree murder after the defendant had entered a plea of guilty to the manslaughter charge.

*Wolff* concedes that the nature of the prison system at times requires restriction of due process rights that an average citizen

enjoys. In *Baxter v. Palmigiano*, 425 U.S. 308 (1976), this Court held that denial of the right to counsel and right of confrontation in prisoner disciplinary proceedings was proper because of a danger of disruption, intimidation and danger within the penal institution. In the present case, however, there is no safety, order or correctional goal which is compromised by requiring prison adjustment board officials to give notice to an inmate of an increase in the nature of the charge against him. There is no valid penological purpose for failure to give an inmate prior notice before changing the disciplinary charge to a more serious violation with substantially greater penalties to the inmate's liberty interests. Indeed, advance notice of the charge is one of the core rights guaranteed an inmate by *Wolff*. *Wolff*, 418 U.S. at 564.

Because the aforesaid allegations of Petitioner are contained in his Complaint and they constitute a *prima facie* violation of due process rights under the Fifth and Fourteenth Amendments to the Constitution of the United States, the Eighth Circuit Court of Appeals erred in affirming the District Court's *sua sponte* dismissal of Petitioner's Complaint. The District Court has authority to dismiss a complaint *sua sponte* under 28 U.S.C. § 1915(d), "if satisfied that the action is frivolous or malicious." This Court held in *Neitzke v. Williams*, 490 U.S. 319 (1989), that a claim shall be dismissed under 28 U.S.C. § 1915(d) "where it lacks an arguable basis either in law or in fact." *Id.* at 325. In addition, this Court held that "a complaint filed in *forma pauperis* is not automatically frivolous within the meaning of § 1915(d) because it fails to state a claim." *Id.* at 331. To be subject to dismissal as frivolous, it must contain "inarguable legal conclusion" or "fanciful factual allegation." *Id.* at 325. As discussed above, Petitioner's legal claims are not only arguable, but they set forth Respondents' direct challenge to the core due process principles established by this Court in *Wolff*. Moreover, there is no fanciful factual allegation in Petitioner's Complaint. There is no question that the disciplinary charge against Petitioner was upgraded without notice after he had entered his plea before the

Adjustment Board. As a result, the Eighth Circuit erred in affirming the District Court's dismissal of the Complaint *sua sponte* under 28 U.S.C. § 1915(b).

## CONCLUSION

For all the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari be granted.

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## APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-1358

Dale Holt,
Appellant,

v.

Paul Caspari; Major J. P. Smith,
Appellees.

Appeal From the United States District Court
for the Eastern District of Missouri.

Submitted: July 31, 1990
Filed: January 9, 1991

Before JOHN R. GIBSON, Circuit Judge; HEANEY, Senior Circuit Judge; and FAGG, Circuit Judge.

**HEANEY,** Senior Circuit Judge.

Dale Holt, a Missouri inmate, appeals from the district court's dismissal, prior to service of process, of his 42 U.S.C. § 1983 action alleging prison officials violated his due process rights in disciplinary proceedings. We reverse because we believe that Holt's complaint stated a claim sufficient to require an answer from the defendants.

### I. BACKGROUND

The Conduct Violation Report, attached to Holt's complaint, indicates that Holt was found with several pieces of broken tablets marked "Valium." The Report charged Holt with violation of "Rule #24 — Contraband; making, transferring, or having possession of any unauthorized article or substance." The Report, given to Holt as his notice of violation, stated the pills

had been submitted for analysis and that after analysis, the pills, along with all pertinent documentation, would be available to the adjustment board that served as the disciplinary hearing committee.

The "Findings and Evidence Relied On," on the back of the Report states:

> 5-18-89 in presence of counsel substitute John Czajka, who requested the result of the lab test. Mr. Czajka was advised that the lab results were still pending. [Subject] was advised of his Miranda rights, and elected not to make a statement. Board finds that the contraband pills were clearly marked Valium, which is a controlled substance and would lead a reasonable person to believe they were Valium. The pills could pose a threat to the security of the institutions, as they could be consumed or trafficked throughout the institution. The board recommends that the CV be elevated to Rule #3 dangerous contraband.

The Findings also state that Holt was found guilty "by virtue of the report that [subject] was in possession of what is considered dangerous contraband (Valium pills)." Rule 24 is a minor violation and Rule 3, a major violation. The sanctions for violating Rule 3 are substantially more severe and include extension of the conditional release date, loss of good time credit, transfer, and referral for criminal prosecution, which are not available for violation of Rule 24. Holt stated in his complaint that he was recommended for all of these sanctions. Complaint ¶ 15.

Holt brought his section 1983 action against Paul Caspari, superintendent of the prison, and J.P. Smith, chairman of the adjustment board, in their official and individual capacities. Holt claimed a deprivation of due process in that at the hearing Smith refused to advise him of the "documentary evidence, or substance thereof, which the adjustment board would use as evidence against him." Complaint ¶ 9. Holt also claimed he asked

for the result of the laboratory analysis of the pills, but Smith informed him the results had not yet been furnished to the prison. *Id.* ¶ 10. He claimed the refusal to provide him with the substance of the reports to be used against him deprived him of a fair and impartial hearing and the opportunity to controvert the allegations against him, and that the board did not have any laboratory results to confirm the pills were in fact Valium. *Id.* ¶¶ 11, 20. He also claimed the upgrading of the violation from Rule 24 to Rule 3 effectively denied him his right to notice of the charge in order to prepare his defense. *Id.* ¶¶ 14, 21.

Holt further claimed that Caspari's failure to train and supervise subordinates resulted in Smith's actions and that Caspari failed to take proper remedial action upon learning of Holt's allegedly improper disciplinary hearing. *Id.* ¶ 16. He also claimed Caspari and Smith acted "intentionally, wantonly, in bad faith, with punitive purposes in mind, and in total disregard for plaintiff's rights." *Id.* ¶ 19. He sought declaratory and injunctive relief, expunction of the conduct violation, compensatory damages of $100,000, and punitive damages. *Id.* Part X.

The magistrate concluded that Holt had received the process due under *Wolff v. McDonnell*, 418 U.S. 539 (1974), requiring advance notice of the violation, an opportunity to be heard, and a written statement of the evidence relied on. The magistrate found that the statements by the adjustment board in the Findings and Evidence were sufficient, that the finding of guilt was supported by some evidence, and that Holt's claim of not receiving documentary evidence was thus frivolous. The magistrate found the claim regarding the change in the rule violated was also frivolous. The district court accepted the magistrate's findings and dismissed the action under 28 U.S.C. § 1915(d).

On appeal, Holt argues that the refusal to provide him with documentary evidence the board would use, the refusal to disclose the substance of any existing documentary evidence,

the lack of a laboratory report, and the failure to give adequate notice by upgrading the violation during the deliberation violated his due process rights. Brief at 6. He also argues that the "some evidence" rule of *Superintendent v. Hill*, 472 U.S. 445 (1985), is distinct from his claim of failure to disclose the evidence and failure to give adequate notice.

## II. DISCUSSION

Under section 1915(d), a complaint may be dismissed as frivolous if it lacks an arguable basis in either law or fact. *Neitzke v. Williams*, 109 S. Ct. 1827, 1831 (1989). Pro se complaints must be liberally construed and dismissal is warranted only if the face of the complaint shows an insuperable bar to relief. *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972) (per curiam); *Munz v. Parr*, 758 F.2d 1254, 1258 (8th Cir. 1985). By these standards, Holt's claims should not have been dismissed as frivolous under section 1915(d).

Prisoners charged with a disciplinary violation have a right of reasonable access to information necessary to put on a defense. *Meis v. Gunter*, 906 F.2d 364, 367 (8th Cir. 1990). The right is circumscribed by legitimate penological considerations. *Wolff*, 418 U.S. at 564-66 (officials have discretion to limit access to protect legitimate goals); *Smith v. Rabalais*, 659 F.2d 539, 543 (5th Cir. 1981) (right of access to information to prepare a defense not unqualified), *cert. denied*, 455 U.S. 992 (1982); *cf. Harrison v. Dahm*, 911 F.2d 37, 41 (8th Cir. 1990) (no right to have drug test results included in written notice of charges).

A threshold issue is whether Holt has sufficiently alleged the existence of documentary evidence. Nowhere in his complaint does he specifically state that documentary evidence was actually available. A district court is not required to "pretend that certain facts exist in order to foresee a theory of recovery not actually raised or reasonably [implied] by the pleader." *Williams v. Willits*, 853 F.2d 586, 588 (8th Cir. 1988). However, we

believe Holt's allegations that he sought the documentary evidence the board would use against him, that Smith refused to advise him of it or its substance, and that the refusal kept him from adequately preparing a defense, may be read to imply the existence of exculpatory evidence. Moreover, in his objections to the magistrate's report, Holt stated his complaint alleged defendants deprived him of due process by "their failure to disclose and produce certain evidence defendants possessed." Construed in this manner, Holt's complaint does not lack an arguable basis in law and the factual allegations do not facially describe a "fantastic or delusional scenario." *See Neitzke*, 109 S.Ct. at 1833. Thus it was error to dismiss the complaint as frivolous.

We also believe a legal basis exists for Holt's claim that he was denied due process by the rule change. *Wolff* found procedures which included informing a prisoner orally of the charges, followed by further investigation "which may reshape the nature of the charges" at the time of the hearing, inadequate to provide the prisoner with prior notice of the "actual charges." *Wolff*, 418 U.S. at 564. Thus, notice of the "actual charges" must go beyond a recitation of the conduct and include a specification of which rule the conduct violates. *See Rinehart v. Brewer*, 483 F. Supp. 165, 169 (S.D. Iowa 1980) (notice must contain description of incident and citation to rule violated).

This court has held that *Wolff* does not require the notice to specify whether the infraction was "serious or minor." *Jensen v. Satran*, 651 F.2d 605, 607 (8th Cir. 1981). In *Jensen*, however, the prisoner was found guilty of violating the same rule he was charged with, and unlike Holt, "did not argue that the charge was not clearly made known to him." *Id.*

As Holt was deprived of due process because of an inadequate notice and a refusal to allow him access to documentary evidence, the existence of "some evidence" and the board's notifi-

cation to Holt of the evidence ultimately relied on, which would satisfy *Wolff*'s third requirement, corrected the deprivation. These facts affect the remedy available to Holt, and Holt is not entitled to damages, expunction, and reinstatement of good time, but other forms of relief are still available. *Cf. Graham v. Baugham*, 772 F.2d 441, 446-47 (8th Cir. 1988) (no compensatory damages because due process violation did not actually cause deprivation, but remanded for nominal damages, costs, and attorney fees).

Assuming the complaint states a claim, the claim against Caspari may be interpreted as based on a theory of respondeat superior, which will not support a section 1983 action. *See City of Canton, Ohio v. Harris*, 109 S. Ct. 1197, 1203 (1989). We read Holt's claims against Caspari, however, as based not merely on Caspari's role as a supervisor, but on Caspari's own inaction. *See Lewis v. Smith*, 855 F.2d 736, 738 (llth Cir. 1988) (claim not based on theory of respondeat superior and supervisor liable for failing to correct violation in disciplinary proceeding). Caspari will thus be liable if any failure to take action amounted to deliberate indifference or a tacit authorization of a violative process. *See Fruit v. Norris*, 905 F.2d 1147, 1151 (8th Cir. 1990).

## III. CONCLUSION

We reverse the district court's order dismissing Holt's complaint and remand this case to the district court for further proceedings consistent with this opinion.

**JOHN R. GIBSON**, Circuit Judge, dissenting.

While appellant Holt alleges that he was disciplined only after his request for documentary evidence and laboratory reports was denied, I believe that the complaint filed demonstrates that he was provided such information. The conduct violation report is attached to the complaint. The essence of the charge is that when Holt's right hand was forced open, several broken pieces of blue

tablets marked with the word "Valium" were recovered. Because the institutional physician never issues Valium to any residents, Holt was in possession of contraband. The adjustment board found that the contraband pills were clearly marked Valium, a controlled substance, which would lead a reasonable person to believe they were Valium. A reasonable person would further believe that the pills posed a threat to the security of the institution because they could be consumed or trafficked throughout the institution. The findings further referred to the classification committee for possible classification action upon receipt of the lab results. It is apparent that the discipline was administered based on these documents, which were provided to Holt. The attachment of this documentary evidence directly contradicts Holt's allegation. The magistrate relied on these documents in finding that Holt's allegations were frivolous.

The court today recognizes that the complaint does not specifically state that documentary evidence was actually available. It reasoned that the allegations that Holt's request for documentary evidence was refused and that such refusal kept him from adequately preparing a defense "may be read to imply the existence of exculpatory evidence." Slip op. at 5. Under the state of the record before us, I believe that the court, contrary to its protestation, adopts a "fantastic or delusional scenario." *Neitzke*, 109 S. Ct. at 1833, and that it errs in so doing.

We called for a response from the state after this case was appealed to this court. The response demonstrates that after the adjustment board action, the assistant superintendent made further recommendations on the basis of the findings of guilt of the board, and that referral to the classification committee need not depend upon lab results. The only specific allegation in Holt's complaint has to do with failure to furnish the lab results.

Further materials provided by the state reveal that after laboratory results confirmed that the tablets were in fact Valium, the

case was referred to prosecuting authorities (State's App. at 11-12). Holt then entered a guilty plea to a charge of possession of a controlled substance in a correctional institution, a class C felony, and was sentenced to two years imprisonment. The incident of April 20 gave rise to both the disciplinary charge and the criminal charge.

I have no hesitation in concluding that Holt's complaint with the attached materials contained some evidence to support the decision of the prison disciplinary board, thus satisfying the due process requirements of *Superintendent v. Hill*, 472 U.S. 445, 455 (1985).

The court today closes its eyes to the reality of the record in remanding this case to the district court.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

## APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-1358

Dale Holt,
Appellant,

v.

Paul Caspari; Major J.P. Smith,
Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri.

Submitted: September 12, 1991
Filed: April 17, 1992

Before JOHN R. GIBSON, Circuit Judge, HEANEY, Senior Circuit Judge, and FAGG, Circuit Judge.

JOHN R. GIBSON, Circuit Judge.

Dale Holt, a Missouri inmate, appeals from the district court's[1] dismissal, prior to service of process, of his 42 U.S.C. § 1983 (1988) action alleging prison officials violated his due process rights in disciplinary proceedings. We issued an opinion on January 9, 1991, finding that Holt's complaint stated a claim and reversed dismissal. 923 F.2d 103 (8th Cir. 1991). We granted a motion for rehearing and the panel heard argument. We now affirm the dismissal.

The Conduct Violation Report, attached to Holt's complaint, indicates that corrections officers found Holt holding several

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[1] The Honorable George F. Gunn, Jr., United States District Judge for the Eastern District of Missouri.

pieces of broken tablets marked "Valium." The Report charged Holt with violation of "Rule #24 — Contraband; making, transferring, or having possession of any unauthorized article or substance." The Report, given to Holt as his notice of violation, stated the pills had been submitted for analysis and that after analysis, the pills, along with all pertinent documentation, would be available to the adjustment board that served as the disciplinary hearing committee.

The Adjustment Board's "Findings and Evidence Relied On," also attached to the complaint, states:

> 5-18-89 in presence of counsel substitute John Czajka, who requested the result of the lab test. Mr. Czajka was advised that the lab results were still pending. . . . Board finds that the contraband pills were clearly marked Valium, which is a controlled substance and would lead a reasonable person to believe they were Valium. The pills could pose a threat to the security of the institution, as they could be consumed or trafficked throughout the institution. The board recommends that the CV be elevated to Rule #3 dangerous contraband.

The Findings also state that Holt was found guilty "by virtue of the report that [subject] was in possession of what is considered dangerous contraband (Valium pills)." Rule 24 is a minor violation, and Rule 3 is a major violation. The sanctions for a major violation are substantially more severe and include extension of the conditional release date, transfer, and referral for criminal prosecution, which are not available for violation of Rule 24. Holt stated in his complaint that he was recommended for all of these sanctions.

Holt brought his section 1983 action against Paul Caspari, superintendent of the prison, and J.P. Smith, chairman of the Adjustment Board, in their official and individual capacities. Holt claimed a deprivation of due process because at the hearing

Smith refused to advise him of the "documentary evidence, or the substance thereof, which the adjustment board would use as evidence against him." Holt also claimed he asked for the result of the laboratory analysis of the pills, but Smith informed him the results had not yet been furnished to the prison. He claimed the refusal to provide him with the substance of the reports to be used against him deprived him of a fair and impartial hearing and the opportunity to controvert the allegations against him, and that the board did not have any laboratory results to confirm the pills were in fact Valium. He also claimed the upgrading of the violation from Rule 24 to Rule 3 effectively denied him his right to notice of the charge in order to prepare his defense.

Holt further claimed that Caspari's failure to train and supervise subordinates resulted in Smith's actions and that Caspari failed to take proper remedial action upon learning of Holt's allegedly improper disciplinary hearing. He also claimed Caspari and Smith acted "intentionally, wantonly, in bad faith, with punitive purposes in mind, and in total disregard for plaintiffs' [sic] rights." He sought declaratory and injunctive relief, expunction of the conduct violation, compensatory damages of $100,000, and punitive damages.

The magistrate judge[2] concluded that Holt had received the process due under *Wolff v. McDonnell*, 418 U.S. 539 (1974), requiring advance notice of the violation, an opportunity to be heard, and a written statement of the evidence relied on and the reasons for the disciplinary action. The magistrate judge found that the statements by the Adjustment Board in the Findings and Evidence were sufficient, that the finding of guilt was supported by some evidence, and that Holt's claim of not receiving documentary evidence was frivolous. The magistrate judge also found the claim regarding the change in the rule violated was

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[2] The Honorable David D. Noce, United States Magistrate Judge for the Eastern District of Missouri.

frivolous, since Holt received notice that he would have to defend against a possession of contraband charge. The district court accepted the magistrate's findings and dismissed the action under 28 U.S.C. § 1915(d) (1988). Order of Jan. 25, 1990.

On appeal, Holt renews his claims that the refusal to provide him with documentary evidence the board would use, the refusal to disclose the substance of any existing documentary evidence, the lack of a laboratory report, and the failure to give him adequate notice of the charge by upgrading the violation during the deliberation violated his due process rights.

Under section 1915(d), a complaint may be dismissed as frivolous if it lacks an arguable basis either in law or fact. *Neitzke v. Williams*, 490 U.S. 319, 324-27 (1989). Pro se complaints must be liberally construed and can be dismissed only if the face of the complaint shows an insuperable bar to relief. *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972) (per curiam); *Munz v. Parr*, 758 F.2d 1254, 1258 (8th Cir. 1985).

Holt attached to his pro se pleading copies of the various disciplinary reports and notations made by the Adjustment Board concerning the reports. The minutes of the Adjustment Board action are excerpted above in this opinion. It is evident from the face of Holt's complaint and the attachments that the board found that the contraband pills were clearly marked Valium, which is contraband and a threat to the security of the institution because of the danger of consumption and trafficking. The Adjustment Board found Holt guilty by virtue of the report that he possessed dangerous contraband, and the report recited that Valium was not issued to residents in the institution under any circumstances. While Holt complains that he was not furnished the laboratory report, the board's minutes showed that the board did not have any such report, either. The board did not need any such report because, as it stated, "[t]he contraband pills were clearly marked Valium, which . . . would lead a reasonable

person to believe they were Valium." The failure to produce a laboratory report is thus irrelevant, since there was no such report in existence, such report had no bearing on the correctional authorities' decision, and the mere appearance of the pills revealed them to be contraband. *Cf. Locher v. Plageman*, 765 F. Supp. 1260, 1262 (W.D. Va. 1991) (Prison authorities not required to produce contraband sugar at hearing; "[n]o laboratory analysis was required to determine if the substance was sugar.") The Adjustment Board's decision was supported by "some evidence." *Superintendent v. Hill*, 472 U.S. 445, 455 (1985).

Before issuing our opinion in this case, we called for a written response from the State, and it provided us with documents indicating that Holt pleaded guilty to criminal charges of possession of a controlled substance in a correctional institution, as a result of the same incident that led to the prison disciplinary proceedings at issue here. This guilty plea moots the issues asserted with respect to the propriety of the disciplinary action.

Holt's other argument is that he was denied due process by the committee's action in elevating the charge from possession of contraband under Rule 24 to dangerous contraband under Rule 3. This court has held in *Jensen v. Satran*, 651 F.2d 605, 607 (8th Cir. 1981) (per curiam), that *Wolff v. McDonnell* does not require the infraction notice to specify whether the offense charged was serious or minor. Here, the charge was possession of the Valium, and while the change from a Rule 24 charge to a Rule 3 charge raised the potential penalties, the factual basis for both was possession of the same Valium at the same time. It is evident that the conduct violation report gave Holt all of the information he needed to make his defense.

That the Adjustment Board considered the contraband to be sufficiently dangerous to warrant an increased penalty may have been to Holt's detriment, but did not change the factual charge

that had been made against him, namely possession of Valium. Any defense he would assert would not differ because of the increase in the penalty. The facts are set forth plainly and clearly, and a constitutional violation has not been charged.

We affirm the judgment of the district court.

**HEANEY,** Senior Circuit Judge, dissenting.

I agree that the pro se complaint must be liberally construed and dismissal is warranted only if the face of the complaint shows an insuperable bar to relief. In my view, Holt's complaint should not have been dismissed under this standard. Thus, I respectfully dissent.

Prisoners charged with a disciplinary violation have a right of reasonable access to information necessary to put on a defense. *Meis v. Gunter*, 906 F.2d 364, 367 (8th Cir. 1990). The right is circumscribed by legitimate penological considerations. *Wolff*, 418 U.S. at 564-66 (officials have discretion to limit access to protect legitimate goals); *Smith v. Rabalais*, 659 F.2d 539, 543 (5th Cir. 1981) (right of access to information to prepare a defense not unqualified), *cert. denied*, 455 U.S. 992 (1982); *cf. Harrison v. Dahm*, 911 F.2d 37, 41 (8th Cir. 1990) (no right to have drug test results included in written notice of charges).

A threshold issue is whether Holt has sufficiently alleged the existence of documentary evidence. Nowhere in his complaint does he specifically state that documentary evidence was actually available. A district court is not required to "pretend that certain facts exist in order to foresee a theory of recovery not actually raised or reasonably [implied] by the pleader." *Williams v. Willits*, 853 F.2d 586, 588 (8th Cir. 1988). However, I believe Holt's allegations that he sought the documentary evidence the board would use against him, that Smith refused to advise him of it or its substance, and that the refusal kept him from adequately preparing a defense, may be read to imply the existence of

exculpatory evidence. Moreover, in his objections to the magistrate's report, Holt stated his complaint alleged defendants deprived him of due process by "their failure to disclose and produce certain evidence defendants possessed." Construed in this manner, Holt's complaint does not lack an arguable basis in law and the factual allegations do not facially describe a "fantastic or delusional scenario." *See Neitzke*, 490 U.S. at 328. Thus it was error to dismiss the complaint as frivolous.

In my view, a legal basis exists for Holt's claim that he was denied due process by the rule change. *Wolff* found procedures which included informing a prisoner orally of the charges, followed by further investigation "which may reshape the nature of the charges" at the time of the hearing, inadequate to provide the prisoner with prior notice of the "actual charges." *Wolff*, 418 U.S. at 564. Thus, notice of the "actual charges" must go beyond a recitation of the conduct and include a specification of which rule the conduct violates. *See Rinehart v. Brewer*, 483 F. Supp. 165, 169 (S.D. Iowa 1980) (notice must contain description of incident and citation to rule violated).

This court has held that *Wolff* does not require the notice to specify whether the infraction was "serious or minor." *Jensen v. Satran*, 651 F.2d 605, 607 (8th Cir. 1981). In *Jensen*, however, the prisoner was found guilty of violating the same rule he was charged with, and unlike Holt, "did not argue that the charge was not clearly made known to him." *Id.*

Holt's claim against Caspari may be interpreted as based on a theory of respondeat superior, which will not support a section 1983 action. *See City of Canton, Ohio v. Harris*, 489 U.S. 381, 385 (1989). I read Holt's claims against Caspari, however, as based not merely on Caspari's role as a supervisor, but on Caspari's own inaction. *See Lewis v. Smith*, 855 F.2d 736, 738 (11th Cir. 1988) (claim not based on theory of respondeat superior and supervisor liable for failing to correct violation in

disciplinary proceeding). Caspari could thus be liable if any failure to take action amounted to deliberate indifference or a tacit authorization of a violative process. *See Fruit v. Norris*, 905 F.2d 1147, 1151 (8th Cir. 1990).

I emphasize the posture in which Holt's claims come before us: Holt's in forma pauperis complaint was dismissed as frivolous prior to service of process. Under section 1915(d), such dismissals are proper only if the claims involve indisputably meritless legal theories or clearly baseless factual contentions. *Neitzke*, 490 U.S. at 327. My discussion of Holt's claims seeks only to demonstrate that they withstand scrutiny for frivolousness under *Neitzke* and therefore require an answer from the defendants. I express no opinion on the merits of his claims.

I do not believe that Holt's guilty plea to criminal charges arising out of the same incident can negate his right to procedural due process in connection with the prison disciplinary proceeding. The guilty plea means only that Holt cannot demonstrate actual injury flowing from any due process denial that occurred. In another prisoner's 1983 complaint before the Supreme Court in a similar posture, the Court stated:

> [E]ven if the subsequent hearing accorded petitioner minimized or eliminated any compensable harm resulting from the initial denial of procedural safeguards, his constitutional claim is nonetheless actionable... "Because the right to procedural due process is 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions, and because of the importance to organized society that procedural due process be observed . . . the denial of procedural due process should be actionable for nominal damages without proof of actual injury."

*Hughes v. Rowe*, 449 U.S. 5, 13 n.12 (1980) (quoting *Carey v. Piphus*, 435 U.S. 247, 266-67 (1978) (footnote and citations

omitted)); *see also Graham v. Baughman*, 772 F.2d 441, 447 (8th Cir. 1985).

I would reverse the district court's order dismissing Holt's complaint and remand this case to the district court for further proceedings consistent with this dissent.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

## APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-1358EMSL

Dale Holt,
Appellant,

vs.

Paul Caspari; Major J.P. Smith,
Appellees.

Order Denying Petition for Rehearing and
Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. Judge McMillian would grant the suggestion for rehearing en banc.

The petition for rehearing is also denied.

June 2, 1992

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit